STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	)	
On Its Own Motion	)	
	)	**Docket No. 01-0539**
Implementation of Section 712(g) of the	)	
Public Utilities Act	)	

REPLY BRIEF OF THE STAFF OF THE ILLINOIS COMMERCE COMMISSION

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The Staff of the Illinois Commerce Commission ("Staff"), by and through its counsel, and pursuant to Section 200.800 of the Illinois Commerce Commission's Rules of Practice (83 Ill. Adm. Code 200.800), respectfully submits this reply brief in the above-captioned proceeding.

I. INTRODUCTION

The Initial Brief of the Staff of the Illinois Commerce Commission ("Commission") was filed on September 25, 2002 ("Staff IB" or "Staff's Initial Brief"). The following initial briefs were also filed on September 25, 2002: the Initial Post Hearing Brief of Allegiance Telecom of Illinois, Inc., McLeodUSA Telecommunications Services, Inc., Nuvox Communications of Illinois, Inc., RCN Telecom Services of Illinois, Inc. and TDS Metrocom, LLC ("Allegiance IB"), the Post-Hearing Brief of Ameritech Illinois ("Ameritech IB"), the Brief of AT&T ("AT&T IB"), the Initial Brief of Citizens Telecommunications Company of Illinois ("Citizens IB"), the Initial Brief of Focal Communications Corporation ("Focal IB"), the Initial Brief of Gallatin River Communications, LLC ("Gallatin IB"), the Initial Brief of The Illinois Rural Competitive Alliance ("IRCA IB"), the Initial Brief of Verizon North Inc. and Verizon South Inc.

("Verizon IB"), the Initial Brief of The Wireless Coalition ("Wireless Coalition IB"), and the Initial Brief of WorldCom, Inc. ("WorldCom IB").

As explained in Staff's Initial Brief, this proceeding to implement carrier to carrier wholesale service quality rules and remedies to ensure enforcement of those rules pursuant to Section 13-712(g) of the Illinois Public Utilities Act ("PUA") has focused on Staff's proposed rule ("Staff's Proposed Rule"), a current version of which was attached as Attachment 1 to Staff's Initial Brief. Although there is not complete agreement as to the content of a final rule and significant disputes do remain, the initial briefs confirm that many parties to this proceeding support all or a significant portion of Staff's Proposed Rule and virtually all parties support some portions of Staff's Proposed Rule. The fact that objections, as well as support, come from both incumbent local exchange carriers ("ILECs") and competitive local exchange carriers ("CLECs") reflects, in Staff's opinion, that Staff succeeded in its effort to develop and propose a fair and reasonable rule that acknowledges and accommodates, to the extent possible, the interest and needs of ILECs, CLECs and end users within the framework of the General Assembly's mandate to implement wholesale service quality rules and related remedies.

Staff's Initial Brief identified and responded to many if not most of the objections to Staff's Proposed Rule raised in the other parties' initial briefs. In this reply brief Staff has incorporated many of those responses by reference or citation to Staff's Initial Brief. However, in the interest of brevity, Staff has not raised and repeated every argument and response previously addressed in Staff's Initial Brief. Thus, the omission of a response to an argument that Staff previously addressed simply means that Staff stands on the position taken in Staff's Initial Brief because further or additional comment is neither needed nor warranted.

In their initial briefs, some of the parties suggested minor wording changes to Staff's Proposed Rule to eliminate some perceived ambiguity or potential unintended consequence. Staff agrees with some of those suggested wording changes as indicated below, and the minor modifications supported by Staff are reflected in legislative style in Attachment 1 to this reply brief. As explained in detail below and in Staff's Initial Brief, the other arguments raised by the parties lack merit and must be rejected. Staff's Proposed Rule is reasonable, fair, and proper, as well as consistent with the intent of the General Assembly, and thus should be adopted by the Commission.

II. AMERITECH'S OBJECTION TO STAFF'S USE OF ITS PREEXISTING PLAN ON AN INTERIM BASIS SHOULD BE REJECTED

Ameritech asserts that "[t]he issue here is a straightforward one of statutory interpretation: Does Section 13-712 authorize the Commission to alter the term or scope of a "Preexisting Plan" adopted outside of Section 13-712?"[1] Ameritech IB at 6. Ameritech's argument in this regard is based on a misstatement of Staff's proposal and an improper characterization of the relevant issue. Ameritech points out that Section 13-712(a) states that "the General Assembly . . . intended that 'every

[1] As a preliminary matter, Ameritech states that it "does not seek to re-litigate the substantive changes that the Commission ordered to the Condition 30 plan in Docket No. 01-0120." Ameritech IB at 5. Ameritech also states that it does not seek to litigate here the merits of an agreement that "Ameritech Illinois has already reached . . . with TDS on a plan that would take effect on the October 9, 2002 expiration date of the Condition 30 plan." Ameritech IB at 6. Staff agrees that such matters have no bearing on this rulemaking proceeding. However, it should also be noted that the statement regarding an agreement with TDS is wholly extra-record and should be disregarded. Further, Ameritech's statements regarding the expiration date of the 01-0120 remedy plan is contrary to the Commission's October 1, 2002, Order on Reopening in Docket No. 01-0120 ("Order on Reopening").

telecommunications carrier meet minimum service quality standards in providing basic local exchange service on a non-discriminatory basis to all classes of customers.'" Ameritech IB at 6. Without any explanation or support, Ameritech then concludes in the very next sentence of its brief that "[t]o help implement this intent, Section 13-712(g) directs the Commission to establish 'carrier to carrier wholesale service quality rules.'" Ameritech IB at 6.

Notwithstanding Ameritech's proclamation that it is not seeking to relitigate the remedy plan issues resolved by the Commission in Docket No. 01-0120, most of Ameritech's criticism's of Staff's Proposed Rule stem from its disagreement with the decision issued by the Commission in Docket No. 01-0120. *See* Ameritech IB at 5-7. Ameritech's brief confuses this issue by failing to explain how Staff's Proposed Rule actually uses and relies upon a Preexisting Plan, and then further obfuscates this issue by misstating Staff's position. While Staff's Proposed Rule recognized that there are carriers with Preexisting Plans, neither Staff's Proposed Rule nor Staff's testimony support Ameritech's assertion that Staff appears to agree that Wholesale Service Quality Rules are "unnecessary during the term of the Preexisting Plan." Ameritech IB at 6-7. To the contrary, Section 731.200(a) of Staff's Proposed Rule requires each Level 1 carrier to file, for approval, a tariff containing its Wholesale Service Quality Plan consistent with the criteria set forth in Staff's Proposed Rule.

Preexisting Plans only come into play as the starting point for future plans, and as an interim effective plan pending the effective date of its tariffed plan due to be filed April 1, 2003. Staff's Proposed Rule §§ 731.220(b)(2), 731.230(b), 731.305, 731.315. Specifically, Section 731.230(b) of Staff's Proposed Rule provides as follows:

b) For a carrier with a Preexisting Plan, its Preexisting Plan shall be its effective Wholesale Service Quality Plan from the effective date of this rule through the effective date of its tariff due to be filed April 1, 2003, under Section 731.200. The provisions of this paragraph shall apply notwithstanding any provision, term or condition of the Preexisting Plan, or any related Commission order, providing for the termination or expiration of such plan due to or based on the passage of time.

Thus, to put Ameritech's arguments in their proper context, Ameritech's complaints in this regard all relate to the fact that Staff's Proposed Rule uses Ameritech's fully litigated remedy plan from Docket No. 01-0120 as an interim effective Wholesale Service Quality Plan under Part 731 for a period of time not likely to exceed six (6) months.[2] As explained below, Ameritech's straw man arguments miss the mark and lack merit.

Contrary to Ameritech's assertions, Staff has not sought to extend the term of the 01-0120 remedy plan or bring it back to life. *See* Ameritech IB at 7. What Ameritech fails to acknowledge is that Staff's Proposed Rule, including the provisions establishing that a Preexisting Plan shall serve an interim effective Wholesale Service Quality Plan, will, if adopted by Commission, constitute an exercise of the Commission's independent power, authority and duty under Section 13-712(g) of the PUA. 220 ILCS 5/13-712(g). Language that results in the adoption of the 01-0120 remedy plan as the interim Wholesale Service Quality Plan for purposes of Part 731 is not an extension of the 01-

[2] Allowing for required notices, it does not appear that the Part 731 rule ultimately adopted by the Commission in this docket will become effective prior to March, 2003. Section 731.200(a) requires the initial Wholesale Service Quality Plan to be filed by April 1, 2003. Section 731.210 of Staff's Proposed Rule provides for proceedings to consider Wholesale Service Quality Plans to be scheduled "so that a Proposed Order is presented to the Commission by the Administrative Law Judge no later than 3 months after the date of the carrier's filing."

0120 remedy plan under the merger order.[3] Nothing in Staff's Proposed Rule even purports to address the term of Ameritech's merger condition. *See* Ameritech IB at 7.

Ameritech's attack on the establishment of carrier levels in Staff's Proposed Rule with respect to Preexisting Plans similarly lacks merit. *See* Ameritech IB at 7-8. Staff fully explained in testimony and in its initial brief why the use of levels is appropriate for purposes of Part 731. *See* Staff IB at 7-9, 31-36, 38-40. Without repeating those arguments here, the establishment of levels is appropriate for several reasons, including but not limited to reasonableness, administrative ease, logical designation, and purchasing carrier requests, and is further justified because of significant differences among carriers in terms of size and importance to competition. Ameritech has offered no substantive basis to question the establishment of levels – rather, Ameritech ignores

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[3] Staff would also note that on October 1, 2002, the Commission entered an Order on Reopening in Docket No. 01-0120 ("Order on Reopening"). In the Order on Reopening, the Commission stated as follows:

> This Commission has no concerns about what remedy plan will apply after October 8, 2002. In response to the Joint Petition of Ameritech Illinois and a number of other certificated telecommunications carriers, this Commission held evidentiary hearings, considered legal argument, and laid out with precision, in its Order of July 10, 2002, the tariffed remedy plan Ameritech Illinois was to file. The Order did not provide for any sunset or automatic termination for that tariffed remedy plan; it simply ordered Ameritech Illinois to "file a tariff to reflect the revisions to the Plan that are reflected in this Order.

Order on Reopening at 3. Accordingly, the Commission ordered Ameritech to refile its Remedy Plan tariff without the footnote indicating that the Remedy Plan tariff expires on October 8, 2002. *Id*. In this regard, the Commission also found as follows:

> Staff also recommends that, in the context of imposing the deletion of Footnote 1 from the August 9 filing, the Commission clarify that the Commission-ordered remedy plan will be available past October 8, 2002, and for the indefinite future until modified in accordance with applicable law, to telecommunications carriers whose legal right to the remedy plan is based on interconnection agreements with Ameritech Illinois, in lieu of or in addition to the tariffed remedy plan. The Commission accepts this Staff recommendation.

Id. at footnote 1. Thus, although the expiration date of the 01-0120 remedy plan is not relevant to this proceeding, Ameritech's contention that the 01-0120 remedy plan expired on October 8 is not shared by the Commission.

the overwhelming evidence supporting the establishment of levels and simply assumes that levels are somehow improper or unfair.

Ameritech's contention that Section 13-712(g) does not authorize levels or different treatment of different carriers is similarly unavailing. *See* Ameritech IB at 9. Section 13-712(g) consists of a single sentence: "The Commission shall establish and implement carrier to carrier wholesale service quality rules and establish remedies to ensure enforcement of the rules." 220 ILCS 5/13-712(g). The language of Section 13-712(g) is very broad, and contains no restrictions or limitations on the Commission's obligation and authority to establish carrier to carrier wholesale service quality rules. The legislature neither required nor prohibited consideration of particular services, company size, level of competition, business rules, benchmarks, parity, disaggregations, statistical methods, or any of the many other issues relevant to the development of wholesale service quality standards and remedies.

Not finding refuge in the language of Section 13-712(g), Ameritech retreats into reliance on other portions of Section 13-712 which are neither relevant nor applicable to the issues in this rulemaking. *See* Ameritech IB at 9-10. As explained in Staff's Initial Brief, reliance on Section 13-712(a) is misplaced and ignores the overall structure of Section 13-712. *See* Staff IB at 34-35. Section 13-712(a) states that "[i]t is the intent of the General Assembly that every telecommunications carrier meet minimum service quality standards in providing basic local exchange service on a non-discriminatory basis to all classes of customers." 220 ILCS 5/13-712(a). The General Assembly consistently tied the "retail" requirements contained in Section 13-712 to basic local exchange service, but did not tie the "wholesale" requirements – that is, Section 13-

712(g) -- to basic local exchange service. *See* Staff IB at 33-34. Thus, although Section 13-712(a) sets forth an expression of legislative intent regarding service quality standards applicable to basic local exchange service, it is not applicable to the requirement set forth in Section 13-712(g) to establish wholesale service quality rules. *Id*.

Ameritech also contends that the General Assembly did not intend to allow the Commission discretion to treat different carriers differently because it was silent on the subject:

> Where the General Assembly sought to single out carriers, either based on size or because they are "incumbent" local exchange carriers, it said so. E.g., 220 ILCS 5/13-801 (establishing duties that apply only to "incumbent local exchange carriers"); 220 ILCS 5/13-504 (distinguishing between carriers with fewer than and greater than 35,000 access lines). It did not do so in Section 13-712.

Ameritech IB at 9.[4] Ameritech's argument is based on faulty reasoning and an inappropriate analogy. Staff does not dispute that the presence of language in one section of a statute that is omitted in another can be indicative of the intent of the General Assembly.[5] *See Freeman United Coal Mining Co. v. Industrial Comm'n*, 99 Ill.2d 487, 497 (1984). Such an "analysis is, in effect, an application of the rule of statutory construction known as *expressio unius est exclusio alterius*." *In re Marriage of Thornton*, 89 Ill.App.3d 1078, 1084 (1st Dist. 1980). "However, this maxim is not a rule of law, and great care is required in its application. The maxim is never to be applied to

[4] The requirements of Section 13-801, to the extent that they exceed the obligations imposed by Section 251 of the Telecommunications Act of 1996, are limited to incumbent local exchange carriers subject to an alternative regulation plan pursuant to Section 13-506.1 of the PUA. *See* 220 ILCS 5/13-801(a).

[5] Indeed, the fact that the General Assembly's omitted the phrase "basic local exchange service" from paragraph (g) of Section 13-712, but included that phrase as a limitation in paragraphs (c) through (f) of Section 13-712, logically and reasonably should be construed to indicate that the General Assembly did (continued…)

defeat or override the legislative intent or purpose and may be utilized only where it appears to point to that intent or purpose." Id. (citations omitted); *see also* 2A N. Singer, Sutherland on Statutory Construction § 47.25 (6th ed. 2000).

First, Ameritech's argument is an improper application of the underlying doctrine. Rather than referring to specific "language" used in one section of the PUA but not another, Ameritech refers to a "concept" allegedly used in one section of the PUA but not another. Ameritech's loose use of this rule of construction does not comport with the requirement to use great care in its application. *Thornton*, 89 Ill.App.3d at 1084. Second, whereas Staff has used this rule to point to the omission of specific language used in adjacent paragraphs of the same Section of the PUA, Ameritech points to "concepts" in totally different Sections of the PUA. Third, it is neither logical nor reasonable to interpret the fact that the General Assembly has limited specific requirements in other sections of the PUA to specific categories of carriers, to mean that the General Assembly intended every other section of the PUA to prohibit reasonable classifications of carriers. Indeed, this logic is belied by the existence of numerous Commission rules making such classifications. *See* Staff IB at 39.

Ameritech also states, with respect to its Preexisting Plan, that "standards and remedies established under a different body of law are governed by that different body of law, not by Section 13-712." Ameritech IB at 10. That statement may be generally true[6], but Ameritech's application is erroneous. The instant proceeding is not one

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not intend to limit Section 13-712(g) to "basic local exchange service". *See* Staff IB at 33-34.

[6] In this context, Staff understands the "different bodies of law" to refer to the "merger condition obligations" and "interconnection agreements". Interconnection agreements, of course, are subject to application of State law service quality requirements under 47 U.S.C. § 252(e)(3). Further, Ameritech's
(continued…)

"under a different body of law". This is a proceeding to implement Section 13-712(g) and, as noted above, Ameritech simply refuses to acknowledge that Staff's Proposed Rule, including the provisions establishing that a Preexisting Plan shall serve as an interim Wholesale Service Quality Plan, will, if adopted by Commission, constitute an exercise of the Commission's independent power, authority and duty under Section 13-712(g).

As explained in Staff's Initial Brief, not only is use of a Preexisting Plan logical and reasonable, but it would also be unreasonable and inappropriate to disregard or minimize the considerable effort by all parties to develop the Preexisting Plans. *See* Staff IB at 6-7, 8, 12, 53-54. When one considers that Ameritech has extrapolated an objection to adoption of its Preexisting Plan as an interim effective Wholesale Service Quality Plan into an objection to all Level 1 carrier provisions generally, it becomes obvious that what Ameritech actually finds objectionable is the fact that Staff's Proposed Rule provides for the Commission to be the ultimate decision maker with respect to wholesale service quality issues rather than Ameritech. Such an objection lacks any merit given the General Assembly's mandate for the Commission to implement carrier to carrier wholesale service quality rules and remedies to ensure enforcement of those rules. 220 ILCS 5/13-712(g). Accordingly, Ameritech's arguments must be denied.

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negotiations with TDS are neither an issue in, nor relevant to, this proceeding. Staff would note that the filing for approval of a TDS/Ameritech remedy plan amendment has been withdrawn and not refilled to date. *See* Joint Notice of Withdrawal of Joint Petition for Approval of First Amendment to the Interconnection Agreement between TDS Metrocom, LLC and Ameritech Illinois, Ill. C.C. Docket No. 02-0558 (October 4, 2002).

III. AMERITECH'S OBJECTIONS TO STAFF'S PROPOSED REMEDIES

Ameritech argues that the PUA does not authorize the Commission to impose a remedy plan of the nature that Staff proposes. More specifically, Ameritech contends that: (1) Staff's proposed Part 731 is too broad in scope because it covers advanced services and is, thus, not limited to basic local exchange services; and (2) Staff's proposed self-executing remedies are not authorized under the PUA. Ameritech IB at 10-12. Staff disagrees.

A. Section 712(g) Is Not Limited To Basic Local Exchange Service

Regarding Ameritech's contention that advanced services are not basic local exchanges services and, thus, should not be covered by Part 731, as Staff fully explained in its Initial Brief, the language of Section 13-712 indicates that the legislature referred to basic local exchange service in the context of retail service quality requirements, not wholesale service quality requirements. Staff IB at 37. The requirement to establish carrier to carrier wholesale service quality rules set forth in Section 13-712(g) is not limited to "basic local exchange service". Section 13-712(g) contains no reference to basic local exchange service. ICC Staff Ex. 7.0 at 8. Further, as explained above, the language of Section 13-712(g) leads to the conclusion that it allows the Commission a great deal of latitude to determine what should be covered in this rulemaking, and in what manner. Although Section 13-712 does contain the words "basic local exchange service" in its heading, it is a well established rule of statutory construction that in interpreting the meaning of a particular section, the plain meaning of the substantive provisions of the section cannot be limited by its heading. *People v. Trigg*, 97 Ill. App. 2d 261, 270 (1st Dist. 1968).

Additionally, it is clear that carriers purchasing wholesale services need the wholesale service quality measures to cover more than just basic local exchange service to help facilitate the competitive environment in Illinois. ICC Staff Ex. 7.0 at 8. For example, many carriers assert that they need wholesale service quality standards for special access measures. *Id*. The point here is that to restrict the wholesale measures to basic local exchange service would be to eliminate a range of services needed by many CLECs to foster and protect competition. Such a construction of Section 13-712 is contrary to the pro-competitive goals of HB 2900, of which Section 13-712 was a part. Staff IB at 37-38.

B. Section 712(g) Expressly Authorizes Staff's Proposed Remedies

Regarding Ameritech's assertions that Staff's proposed self-executing remedies should be disregarded because they are not authorized under the PUA, Staff submits that Ameritech's statutory construction arguments are simply wrong. Ameritech, in support of its position, argues that Staff's proposed structure of remedy payments is inconsistent with the structure set forth in § 13-712. Ameritech IB at 10. Ameritech goes on to analyze the structure of §13-712 and other Article 13 provisions that also authorize remedy payments without once referring to the only provision of § 13-712 that really matters in this proceeding, which is § 13-712(g). Ameritech notes that §13-712(e) authorizes automatic remedies in the form of credits, the amounts of which are related to the charges for the service at issue, while also distinguishing between credits and penalties. Ameritech IB at 10-11. Ameritech also argues that any payments beyond credits "require case specific proceedings with the protections of notice and an opportunity to be heard," *citing* to §§13-305, 13-304(a), 13-515(j), and 13-516(c). Ameritech IB at 11. Ameritech, however, purposefully ignores §13-712(g), the most relevant PUA provision to this rulemaking, because that provision obviously does not support Ameritech's attempts to eliminate its obligation to comply with any wholesale service standards and accompanying remedies that have any real meaning. The Commission should summarily dismiss such transparently self-serving arguments.

The Illinois General Assembly, moreover, repeatedly found that it is the policy of the State of Illinois to bring the benefits of competition to consumers in all segments of the telecommunications market, but particularly in the local exchange telecommunications markets. *See* §§13-102(a) through (g)(findings) and §§13-103(a) through (d)(policy statements). For instance, §13-103(c) provides that it is the policy of the State of Illinois that "it is necessary and appropriate to establish rules to encourage and ensure orderly transitions in the development of markets for all telecommunications services." Staff's proposed wholesale performance measures and their accompanying remedy plans do just that, they are employed to "ensure orderly transitions in the development of markets" in the local exchange markets. Staff's proposed rule attempts to fashion a remedy plan that provides sufficient incentives for Ameritech to maintain a high level of wholesale service, and sufficient disincentives for Ameritech to engage in anti-competitive behavior.

Section 13-712(g), moreover, expressly provides that the Commission "*shall* establish and implement carrier-to-carrier wholesale service quality rules and establish *remedies* to ensure enforcement of those rules." 220 ILCS 5/13-712(g) (emphasis added). Illinois courts have long held that the "primary rule of statutory construction is to give effect to legislative intent by first looking at the plain meaning of the language." *See e.g., Davis v. Toshiba*, 186 Ill. 2d 181, 184-85 (1999). Where the statutory language is clear and unambiguous, moreover, "a court must give it effect as written, without reading into it exceptions, limitations or conditions that the legislature did not express." *Id*. (Internal punctuation and citations omitted.)

Accordingly, although other sections of the PUA *may* be relevant in interpreting an *ambiguous* provision of the Act, Section13-712(g) is not ambiguous. It clearly mandates that the Commission "establish remedies" to "ensure enforcement of the "wholesale service quality rules." Neither "remedies" nor "remedy" is defined in the PUA. Remedies, consequently, is to be given its "plain" or "ordinary and popular" meaning. *Union Elec. Co. v. Dep't of Revenue*, 136 Ill.2d 385 (1990). Remedies, moreover, "must be given its full meaning, not the narrowest meaning of which it is susceptible." *Lake County Bd. Of Review v. Property Tax Appeal Board*, 119 Ill. 2d 419, 423 (1998).

Black's Law Dictionary defines "Remedy" as "The means by which a right is enforced or the violation of a right is prevented, redressed, or compensated." Black's Law Dictionary, Abridged 5th Ed. 1983. The General Assembly, of course, used the plural of remedies, indicating its intention that more than one type of remedy was appropriate in promulgating rules under §13-712(g). The proposed remedy payments to CLECS, the Tier 1 payments, contained in Ameritech's Preexisting Plan, clearly fall within the plain and ordinary meaning of Remedy as "compensating" CLECs for substandard wholesale performance or "redressing" such substandard service. Likewise, the payments to the State treasury, the Tier 2 payments, which are designed to "prevent" substandard wholesale service, clearly fall with the plain meaning of "remedies" as preventing substandard service.

Ameritech's attempt to construe §13-712(g) in light of other PUA provisions that address general penalties (§§ 13-304 and 305) and fast-track complaints against carriers that intentionally impede competition (§§13-515(j) and 516(e)) are not relevant because the plain meaning of the legislature's language is clear and unambiguous. In fact, a "court may only look beyond statutory language where it is ambiguous or where a literal interpretation of the statute would lead to an absurd result." *Grams v. Autozone*, 319 Ill. App. 3d 567, 569-70 (3rd Dist. 2001). Ameritech does not argue that Staff's proposed rule will lead to an "absurd result." Moreover, §§ 13-304 and 305 do not apply to a failure to provide adequate quality of wholesale services. Rather, these sections would apply if Ameritech refused to comply with the remedy plan order or this rule. The Commission, accordingly, should summarily dismiss Ameritech's selective statutory construction argument that §13-712 does not authorize the remedies that Staff has proposed.

Finally, initiating and holding separate Commission proceedings for every potential remedy payment, as Ameritech appears to propose, would clearly be administratively impossible for the Commission as well as being outrageously expensive for CLECs to litigate, which would result in damping the nascent competition that is finally emerging in Ameritech's service territories. Moreover, as this Commission is well aware, it has already *fully* considered the necessary and appropriate performance measure plan and remedy plan, including the Tier 2 remedy payments, for Ameritech in Illinois and found them to be appropriate. *See Remedy Plan Order* (July 10, 2002)[7].

[7] Order, *Illinois Bell Telephone Company, AT&T Communications of Illinois, Inc., TCG Illinois, TCG Chicago, TCG St. Louis, CoreComm Illinois, Inc., WorldCom, Inc., McLeodUSA Telecommunications Services, Inc., XO Illinois, Inc., Northpoint Communications, Inc., Rhythms Netconnection and Rhythms* (continued…)

Finally, there is no need to provide for a hearing after each violation of performance standards has occurred regarding the remedy amount to be paid since the remedy amount is a known quantity. Furthermore, Ameritech maintains the records regarding its own performance and self-reports violations of the performance measures so there is no need for a hearing to determine whether a violation has occurred because it is in the hands of Ameritech. The Commission, accordingly, should summarily dismiss Ameritech's transparently specious statutory construction arguments.

IV. AMERITECH'S OBJECTION TO NOTICE OF TERMINATION OF WHOLESALE SERVICE

Ameritech argues that Staff's notice of termination provision for wholesale service should not be adopted. Ameritech IB at 4-5, 21-25. Staff's proposed Section 731.900 requires written notice to be given by the provisioning carrier to the requesting carrier and the Commission no less than 35 days prior to termination, discontinuance or abandonment of a wholesale service. As established below and in Staff's Initial Brief, Staff's proposed Section 731.900 is a proper subject of this proceeding and should be adopted. *See* Staff IB at 18-21, 45-47.

Ameritech raises a non-substantive issue, contending that Section 731.900 is beyond the scope of this proceeding. Ameritech IB at 22. Ameritech contends that Section 731.900 of Staff's Proposed Rule is improper because that provision "does not even set forth standards or remedies for service quality". Ameritech IB at 4. Instead, according to Ameritech, this provision relates to credit and collection issues. Ameritech

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Links, Inc., Sprint Communications L.P., Focal Communications Corporation of Illinois, and Gabriel Communications of Illinois, Inc.: Petition for Resolution of Disputed Issues Pursuant to Condition (30) of the SBC/ Ameritech Merger Order, ICC Docket No. 01-0120 (July 10, 2002).

IB at 22. To the contrary, Section 731.900 does not contain a single reference to, or attempt to address, credit and collection issues. Rather, Section 731.900 simply addresses the disconnection of a wholesale service for any reason, and provides a minimal notice requirement on the provisioning carrier. The fact that notice of termination provisions have been employed in connection with retail credit and collection issues, does not imply that they are improper in connection with wholesale service quality issues. Further, unlike a retail disconnection issue, wholesale disconnection involves three parties (requesting carrier, provisioning carrier and end user customer) rather than two parties (retail carrier and end user customer). In the wholesale context, the end user customer is a completely innocent third party, whereas in the retail context it is the end user that may be responsible for the need for termination.

Ameritech also argues that there is no compelling justification for Section 731.900, and that Staff has not shown that a problem exists. Ameritech IB at 22, 23. To the contrary, Staff witness McClerren fully explained the need for and purpose of a notice of termination. *See* Staff IB at 18-21, 45-47. Further, as testified by Focal witness Daniel Meldazis, issues have arisen between carriers that have demonstrated a need for a notice of termination provision. Focal Exhibit 1 at 4-6. Issues concerning disconnection of a wholesale service are not limited to payment problems by the requesting carrier as suggested by Ameritech. Instead, problems also arise involving good faith disputes between carriers as to their rights and obligations to each other. Staff's proposal provides a reasonable minimal notice requirement that will allow corrective action to be taken or, at a minimum, notice to the end user that his, her or its service will be terminated through no fault of the end user.

Ameritech also suggests that the requirement of notice before termination is already governed by “private interconnection agreements”. Ameritech IB at 4-5, 22. Ameritech cites to the Commission’s September 24, 1999, decision in Docket No. 99-0379 that found that MCI could not place orders manually through a tariff when it had an interconnection agreement calling for electronic ordering. Ameritech IB at 23. This decision is not relevant to the issue presented here – the Commission was addressing MCI’s obligations rather than the Commission’s power or authority. Section 252(e)(3) of the 1996 Act allows the Commission to establish and enforce State law requirements in reviewing an agreement, and specifically references “intrastate telecommunications service quality standards or requirements” as an example of such a state law requirement. 47 U.S.C. § 252(e)(3). Thus, the authority of the Commission to enforce State service quality requirements is clearly established. That certain carriers may have business reasons for seeking notice provisions that are inadequate to provide statutorily required notice, does not justify or require that such provisions be allowed. Staff’s minimum notice requirement is a reasonable requirement designed to ensure that proper notice is provided to end users when wholesale service is terminated.

Ameritech also argues that parties know whether they have the retail resources to pay their bills, and that that Staff’s proposal penalizes Ameritech by providing additional exposure to bad debt. First, as demonstrated by the testimony of Focal witness Daniel Meldazis, issues have arisen between carriers that are based on good disputes between the parties concerning the meaning of their contract language. *See*

Focal Exhibit 1 at 4-6. Thus, termination situations are not limited to financial resource issues. Second, Staff witness McClerren explained that the risk of additional exposure is minimal, and in any event justified by the potential harm to end users. *See* Staff IB at 46.

V. ADDITIONAL AMERITECH PROPOSED CHANGES

A. Section 731.105 - Definition of Maintenance and Repair

Ameritech contends that the phrases "view status history" and "receive proactive status reports" in Staff's proposed definition of "Maintenance and Repair" should be deleted because it is not clear what Staff intends by these phrases. Ameritech IB at 30. Section 731.105 of Staff's Proposed Rule contains the following definition:

> "Maintenance and Repair" means the actions taken or functions used to create trouble reports, view status history, receive proactive status reports, and clear and close trouble reports.

The questioned phrases as well as the balance of the definition are intended to provide an explanation for the types of functions that may be required in the maintenance and repair category. The rules adopted in the Wholesale Service Quality Plan will say or indicate specifically what is being measured. Further, the definition does not imply or indicate that any of the mentioned items is a required function by a provider. Staff opposes deleting the subject phrases because they help explain what is contemplated by maintenance and repair. However, in response to Ameritech's concerns, Staff is willing to provide some additional clarification, and proposes the following revised language:

> "Maintenance and Repair" means the actions taken or functions used to create trouble reports, view or determine trouble report status and trouble report ~~status~~ history, receive proactive status on trouble reports, and clear and close trouble reports.

B. Section 731.220(b)(3) – Wholesale Service Quality Plan Filing Requirements

Ameritech objects to the requirement in Section 731.220(b)(3) "to submit testimony and exhibits addressing "[t]he extent to which the carrier's Wholesale Service Quality Plan has successfully facilitated a competitive telecommunications market." Ameritech IB at 30-31. First, Ameritech objects to this requirement because it objects to the incorporation of levels into Staff's Proposed Rule. Staff has already demonstrated the deficiencies in Ameritech's levels arguments, and those arguments will not be repeated here. Ameritech states that service quality is only one of several factors that can facilitate a competitive telecommunications market, and contends that it would have to speculate about business decisions of CLECs. Ameritech IB at 31. While Staff does not dispute Ameritech's statement that factors other than service quality impact the development of a competitive telecommunications market, Ameritech has not been asked to comment on those factors in Staff's Proposed Rule. This section of Staff's Proposed Rule is simply an information requirement, and seeks a Level 1 carrier's assessment of its Wholesale Service Quality Plan on the competitive telecommunications market. This is a reasonable request, and will be helpful to the Commission and parties in considering a Wholesale Service Quality Plan. Accordingly, Ameritech's objection should be denied.

C. Section 731.320 (Reporting) and Section 731.410 (Additional Reporting Requirements)

Ameritech argues that the reporting requirements under Section 731.320 and Section 731.410 "should be clarified to ensure that the information reported does not include competitive information about the wholesale service provider or about other competitors, and is limited to data concerning the purchaser's own business transactions, its remedies, if any, and the relevant retail results if a parity comparison is required." Ameritech IB at 31. Ameritech's concern is reasonable, and Staff proposes the following revised language for Section 731.320:

> Each carrier's Wholesale Service Quality Plan shall provide that the Level 1 carrier will report monthly data to the Commission and to each carriers~~s~~ purchasing Wholesale Services. At a minimum, the monthly data shall include the total number of transactions on a per measure basis, the number of instances in which standards contained in the Level 1 carrier's Wholesale Service Quality Plan were not met on a per measure basis, and calculations supporting any remedies paid pursuant to the Wholesale Service Quality Plan ~~to carriers purchasing Wholesale Services from the Level 1 carrier~~. Although aggregate data must be made available to the Commission and all carriers purchasing Wholesale Services, carrier specific data should only be made available to the Commission and carriers for their own (i.e., the purchasing carrier's) business transactions.
>
> Each carrier's Wholesale Service Quality Plan shall indicate the process it will follow each month for reporting including, without limitation, the date performance data and remedy amounts will be made available. The reporting process shall also include the timelines and procedures the carrier will follow when making data and or remedy restatements.

Staff does not agree that a change to 731.410 is required.

D. Section 731.325 (Auditing)

Ameritech "has proposed additional language for Staff's proposed Section 731.325 to clarify that a carrier requesting an audit should pay the costs of an audit unless the basis for requesting the audit is found to be warranted, in which case the costs would shift to the audited carrier." Ameritech IB at 31. Staff disagrees with this proposed language -- there is nothing to clarify as Staff 's Proposed Rule did not decide this issue one way or the other. This is the very type of remedy plan issue that can and should be handled when a Level 1 carrier files its Wholesale Service Quality Plan. There is no need to adopt a single approach to audit costs in the rule.

E. Section 731.400 (Treatment and Effect of Wholesale Service Emergency Situations)

Ameritech proposes changes to Section 731.400 to incorporate for Level 1 carriers the same circumstances under which a Level 2 carrier will not be deemed to have violated wholesale service quality standards. Ameritech IB at 32. Staff disagrees. This language was necessary for Level 2 carriers because all of the standards and related rules for Level 2 carriers are fully contained in Staff's Proposed Rules. Level 1 carriers develop the details of performance standards and related rules in their Wholesale Service Quality Plan, and this issue can and should be addressed in the formulation of the Level 1 carrier's plan.

F. Section 731.410 (Additional Reporting Requirements)

Ameritech proposes that Section 731.410(a) should be revised to require the Commission's website to contain a reference and link to the service quality plan posted on the carrier's website. Ameritech IB at 32. Staff has no objection to this proposal.

G. Section 731.500 (Commission Review and Adoption of Wholesale Service Quality Plans)

Ameritech objects to Staff's proposed Section 731.500(b)(5) which provides that in adopting a Wholesale Service Quality Plan the Commission shall address and consider "[w]hether liability under the Plan's enforcement mechanism would actually accrue at meaningful and significant levels when performance standards are missed." *See* Ameritech IB at 33; Section 731.500(b). Ameritech contends "[t]his subsection either duplicates subsection (b)(4), which asks whether a carrier's potential liabilities under a plan are 'sufficient to provide a meaningful and significant incentive to comply' with the performance standards, or it improperly expands the requirements of (b)(4). If the former, subsection (b)(5) is simply unnecessary." *Id*. While there may be some overlap in the related concepts contained in (b)(4) and (b)(5), the criteria are distinct and should be retained. Whether a Wholesale Service Quality Plan has sufficient "potential" liability for substandard performance, is a different inquiry from whether liability under a plan "would actually accrue at meaningful and significant levels when performance standards are missed".

Staff would also note that the FCC has employed similar criteria in evaluating performance assurance plans for purposes of Section 271 authority to offer long distance service:

> We agree that it is important to assess whether liability under an enforcement mechanism such as the APAP would actually accrue at meaningful and significant levels when performance standards are missed. Indeed, an overall liability amount would be meaningless if there is no likelihood that payments would approach this amount, even in instances of widespread performance failure.

Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York, CC Docket No. 99-295, Memorandum Opinion and Order, FCC 99-404, ¶ 437 (rel. December 22, 1999). For all the foregoing reasons, Ameritech's proposal should be rejected.

VI. VERIZON ARGUMENTS

A. Basic Local Exchange Service

Verizon makes essentially the same arguments advanced by Ameritech with respect to the alleged limitation of Section 13-712(g) to basic local exchange service. Verizon IB at 5-8. Verizon's arguments suffer from the same deficiencies identified by Staff with respect to Ameritech, and Staff's response will not be repeated here.

However, Verizon does raise one new issue not raised by Ameritech that Staff will respond to here.

Verizon argues that Section 13-712(g) is also limited to basic local exchange service because the Commission's initiating order states as follows:

> . . . The Public Act added Section 13-712 to the Act. This Section deals with basic local exchange service quality. Subsection (g) states: . . . .

See Verizon IB at 6. To the contrary, this statement in the Commission's initiating order is neither dispositive not instructive with respect to this issue. First, the Commission's statement was accurate, but does not support Verizon's contention. As a general matter, subparagraphs (c) through (f) of Section 13-712 specifically reference "basic local exchange service," and subparagraph (g) does not. Thus, overall, Section 13-712 does in fact deal with basic local exchange service. As explained above and in Staff's Initial Brief, Subsection 13-712(g) does not. Second, the issue here is the intent of the legislature. Verizon's reliance on a post enactment descriptive statement by the Commission of Section 13-712 generally, in an initiating order, is not indicative of the General Assembly's intent. Third, there is no indication in the Commission's initiating order indicating that it was either considering or deciding this important issue. An initiating order is obviously made before evidence is heard and arguments considered. In this regard, Verizon's argument inappropriately takes the Commission's statement out of context.

B. Compliance With Tariffing Requirements

Verizon also objects to those portions of Staff's Proposed Rule that require Level 1 carrier's to file their Wholesale Service Quality Plan as a tariff. Verizon IB at 12-24. All of Verizon's arguments in this regard fail because they ignore the fact that tariffing of a remedy plan is a mandatory legal requirement under the PUA. *See* Staff IB at 21-30. The Staff's position – that wholesale service quality plans must be filed as state tariffs – is supported by unambiguous provisions of the Public Utilities Act. Section 13-501 of the PUA provides, in relevant part, as follows:

> No telecommunications carrier shall offer or provide telecommunications service unless and until a tariff is filed with the Commission which describes the nature of the service, applicable rates and other charges, terms and conditions of service, and the exchange, exchanges or other geographical area or areas in which the service shall be offered or provided.

220 ILCS 5/13-501. Thus, Section 13-501 of the PUA clearly prohibits telecommunications carriers from offering or providing telecommunications services in the State of Illinois without first filing a tariff describing the rates, charges, terms and conditions thereof. Id.

There can be no argument that a wholesale service quality plan constitutes part of the rates, charges, terms or conditions of a telecommunications service. Section 13-203 of the PUA broadly defines "telecommunications service" as follows:

> "Telecommunications service" means the provision or offering for rent, sale or lease, or in exchange for other value received, of the transmittal of information, by means of electromagnetic, including light, transmission with or without benefit of any closed transmission medium, including all instrumentalities, facilities, apparatus, and services (including the collection, storage, forwarding, switching, and delivery of such information) used to provide such transmission **and includes access and interconnection arrangements and services.**

220 ILCS 5/13-203 (emphasis added). The PUA gives a similarly broad meaning to the term "rate":

> "Rate" includes every individual or joint rate, fare, toll, charge, rental or other compensation of any public utility or any two or more such individual or joint rates, fares, tolls, charges, rental or other compensation of any public utility or any schedule or tariff thereof, **and any rule, regulation, charge, practice or contract relating thereto**.

220 ILCS 5/3-116 (emphasis added). Other provisions of the PUA, as discussed in Staff's Initial Brief, further support the broad interpretation telecommunications services that must be tariffed under the PUA.

Verizon contends that a Wholesale Service Quality Plan is not a "telecommunications service". Verizon IB at 13-17. In essence, Verizon's argument is that a Wholesale Service Quality Plan is not a telecommunications service because carriers do not sell or transmit Wholesale Service Quality Plans. This stands the language of the PUA on its head, and presents an amazingly contorted logic. It cannot be questioned that a Wholesale Service Quality Plan will identify the specific components of the physical provisioning of telecommunications service, as well as the specific quality at which that service should be provided. The manner and level at which a given service must be provided are the routine subject matter of tariffs. Given these facts, it is impossible to give any credence to Verizon's contention that a Wholesale Service Quality Plan is not properly considered a telecommunications service or a rule, regulation, charge, practice or contract relating thereto.

Verizon also suggests that the Commission should adopt its alternative to tariffing or allow for a waiver. Verizon IB at 17-24. Staff has previously responded to many of the specific points raised by Verizon in its Initial Brief. Suffice it to say that the critical fault with these proposals is that the requirement for filing tariffs is a legal requirement of the PUA that cannot be changed or modified. As such, all of Verizon's proposals should be rejected.

VII. SPECIAL ACCESS

Verizon argues first and foremost that special access services are not basic local exchange services and are accordingly "not properly within the scope of Part 731."

Verizon IB at 2. Verizon bases this argument on a statutory construction argument that places undue meaning on the inclusion of the phrase "basic local exchange services" in the title of Section 13-712 of the PUA. As discussed more thoroughly above, Verizon's reliance on this title is misplaced.

Verizon provides three additional arguments as support for its position that special access should not be addressed in this rulemaking. First, Verizon argues enigmatically "[s]pecial access is an access service and, therefore, not a wholesale service subject to regulation under Section 13-712(g)." Verizon IB at 8. Verizon does not explain why an access service cannot be offered on a wholesale basis. The evidence in this proceeding indicates that special access services are offered on both a wholesale and a resale basis. Since Verizon does not support this argument and since it is contrary to the evidence in this proceeding, it should be disregarded.

Second, Verizon argues that special access circuits are jurisdictionally interstate. Id. Verizon points out that the FCC has issued a Notice of Proposed Rulemaking[8] specifically addressing performance standards for special access services and argues that the Commission's rulemaking may have the negative impact of conflicting with federal law if the federal rulemaking is completed in a manner inconsistent with this Commission's rule. Id. In response, Staff notes that the evidence in this proceeding, as well as the affirmative statements of the FCC, affirm that special access can be both intrastate and interstate and that the Commission has clear authority to regulate intrastate special access. In addition, the FCC has indicated in its rulemaking that it is

[8] *In the Matter of Performance Measurements and Standards for Interstate Special Access Services*, CC Docket 01-339, released November 19, 2001, at ¶ 11 (hereinafter, "Special Access NPRM").

considering giving additional authority to the states to regulate special access. Special Access NPRM at ¶ 11. Thus, inconsistency with the federal rule is not as likely as Verizon would have the Commission believe.

Finally, in the telecommunications area, with the dual jurisdiction of the federal and state commissions, waiting until the FCC acts, out of concern that a potential inconsistency may arise, would paralyze the Commission into inaction. There is hardly an area or issue in telecommunications regulation that is not subject to reconsideration, remand or rulemaking. In the past, the Commission has acted when it deemed it prudent or necessary and resolved issues of inconsistency as they arose. The Commission should not abandon its past practice. To do otherwise, would be tantamount to abandoning its jurisdiction. ("[I]t is in the immediate interest of the People of the State of Illinois for the State to exercise its rights within the new framework of federal telecommunications policy to ensure that the economic benefits of competition in all telecommunications service markets are realized as effectively as possible." 220 ILCS 5/13-102(e).)

Third, Verizon asserts, "[t]he record demonstrates that Verizon's performance in provisioning special access service is outstanding." Id. at 9. Leaving aside for a moment the issue of whether this assertion is true, Verizon apparently concludes (based upon the truth of this assertion) that Verizon should be relieved from any obligations regarding service quality standards in this rulemaking. Id. at 10, 11-12. Staff disagrees. First of all, Verizon generally ignores the evidence in the record that their service has been found to be poor, recognizing only once U.S. Cellular's testimony regarding the service problems with respect to special access and then dismissing that testimony by the mere assertion that it was "disingenuous." Id at 9. In addition, Staff points out that Verizon's position is somewhat inconsistent. On the one hand, Verizon argues that no standards should apply to them because their service is good; on the other hand, they argue that Verizon could not meet the proposed standards because they are artificial and unjustified. Tr. at 215-216. Justifiable standards, in Verizon's view, are standards that are historically proven to be achievable, although Verizon does concede that you could add some "stretch" to an objective. Tr. at 217. Verizon's testimony on this point reveals a flaw in their reasoning. "Good" service is to be defined by what Verizon has achieved historically. Standards are not necessary if Verizon has provided "good" service. As a result of this reasoning, Verizon holds all the cards in defining its service objectives: It defines what good service means and it defines it based upon its own past behavior. The needs of its customers apparently have no bearing. It is no wonder Verizon then concludes that it should not be subject to independent, objective standards. If this were a truly competitive market, historical performance would have little significance when compared to the needs of the customer. The carrier who anticipates those needs and responds to them with new technologies and better service would be most successful.

Furthermore, Staff points out that Verizon's position is problematic in terms of ensuring quality service. The first step in correcting a problem is to recognize it exists. Verizon's response to the evidence presented in this proceeding that its service is poor is first, to deny the credibility of this evidence; second, having dismissed its criticisms, to assert that its service must indeed be excellent because its own witnesses say it is so; and third, to argue that it should be exempt from service quality rules because its service is so excellent that the application of these standards is unnecessary. This response, namely, ignoring criticism, is not conducive to maintaining good service quality.

Moreover, the easy reply to Verizon's argument that their service is so excellent that they should be exempted from the rule, is of course, that if Verizon is correct that its performance in provisioning special access services is outstanding, Verizon should be able to meet the standards imposed with ease and the only burden then will be in demonstrating compliance. If, however, the evidence in this proceeding is credible, then Verizon must improve its service quality in order to satisfy the standards to be adopted in this rule and the subsequent approval of its remedy plan. Finally, Verizon completely ignores the evidence of its own witness that indicates that Verizon could not meet the proposed service quality standards. Tr. at 217. This admission indicates that it is necessary to apply service quality standards to Verizon since Verizon's service is not actually good enough to satisfy the proposed standards (despite Verizon's characterization of it as outstanding). Verizon IB at 3. This is particularly true if the proposed standards are found to be reasonable. Since Verizon's own definition of service quality is based solely upon Verizon's historical experience, Staff's rule provides an opportunity to review proposed standards in the context of both Verizon's historical performance and the market expectations and needs of its customers.

Fourth, Verizon believes that Ameritech should be the focus of the Commission's attention and that carriers, to the extent they have issues regarding Verizon's compliance, should use the complaint process to resolve them. Id. at 10. There are several flaws in Verizon's reasoning. First, the regulation of service quality provided by all carriers, particularly ILECs, is uniquely within the realm and responsibility of the Commission. Establishing minimum standards supports the General Assembly's goal of ensuring that telecommunications services be provided in sufficient variety, quality, quantity and reliability to satisfy the public interest. 220 ILCS 5/13-103(a). While the Commission does not want to burden carriers unduly, developing minimum standards for special access and other wholesale services that provide the backbone for competition is an essential part of encouraging and promoting a competitive market. Competitive carriers need reliable services from ILECs in order to provide reliable services to the end user. Development of these standards cannot be reasonably said to be placing undue emphasis on an insignificant or unnecessary element of competition.

In addition, Verizon's argument that "…the complaint process is much better suited to addressing issues relating to one carrier" than a rule of general applicability, misses the mark. Id. at 10.[9] The complaint process is ill suited to address the Commission's concerns regarding the industry as a whole. Verizon appears to ignore the Commission's interest and regulatory duty in developing rules regarding service quality issues at the wholesale level. In addition, it is clear that the complaint process, particularly without the development of Commission wholesale special access service quality standards, is wholly inadequate to achieve the ends of the Commission in developing this rule. The complaint process would force the Commission to rely upon

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[9] To a lesser extent, Ameritech also makes this argument: "The appropriate means to address such carrier-specific complaints is not new rules (much less arbitrary new rules) but a carrier specific complaint to enforce the existing rules." Ameritech IB at 21. What remains unclear however is: what are the "existing rules" to which Ameritech believes itself to be subject? Considering its position in this docket that the 01-0120 remedy plan is both illegal and expired and that self-effectuating penalties cannot be imposed without violating due process, Ameritech appears to consider itself subject to no wholesale service quality rules whatsoever.

individual CLECs to ensure that special access service was being provided adequately. The danger is that many of those CLECs that have legitimate cases against Verizon may also have legitimate business reasons not to litigate issues, including the cost of such suits or the goals of their business plans (including the significance of Verizon's market to those business plans). The CLECs' litigation would also be hampered by the lack of Commission ordered standards.

Finally, Staff's rule does allow Verizon and Ameritech to be treated differently if those differences can be justified in the separate proceeding regarding each of their remedy plans. In other words, Verizon's concern that they will be held to standards that are more appropriately applied to Ameritech is not justified. Verizon's remedy plan will serve as the basis for their obligations. Any standards or measures imposed with respect to special access will be addressed in a proceeding separate and apart from Ameritech's remedy plan proceeding.

Fifth, Verizon also asserts that no evidence was presented in this proceeding regarding the need to include special access in the Part 731 rule and that Staff, in particular, "presented no evidence whatsoever-not one word of testimony." Verizon IB at 9. This is simply not true. The record contains substantial evidence of the need for special access services. The Wireless carriers and Worldcom in particular presented evidence of the essential role that special access services play in their provisioning of services. See, Wireless Coalition Brief at 2-3, 16-22 (includes numerous pertinent cites to both testimony and transcript); WorldCom Ex. 1.0at 8. In fact, Staff's initial brief provided an analysis of much of this evidence. Staff IB at 78-80. Moreover, Staff's testimony did address the need for special access services and Staff's proposed rule specifically included a provision that special access must be addressed by the Level 1 carriers. Staff Exhibit 8.0 at 4-5 ("Staff, nevertheless, believes that there are enough intrastate circuits being ordered by both wire and wireless carriers that there needs to be standards, measurements, and remedies for those companies ordering these wholesale services."); See, also, Staff Exhibit 8.0 at 5 (lines 121-127). Staff's witness was available for cross-examination. Questions regarding the need for special access standards were certainly within the scope of Staff's testimony. If Verizon desired additional information from Staff as to why Staff saw a need for special access standards, it could have utilized its right to cross-examination. It is inaccurate, however, to state that neither Staff nor any other carrier testified as to the need for special access standards. This appears to be another case of Verizon dismissing, or even denying, evidence that is inconsistent with its position. As a result, Verizon's inaccurate assertions should be given no weight.

Finally, Verizon proposes that the Part 731 rule should allow for waiver of any particular section of the rule. Verizon IB at 11-12. Staff recommends against adoption of Verizon's proposal. First, a waiver is unnecessary because Section 13-513 of the PUA provides for a waiver of all or any part of a rule if the carrier can demonstrate that the waiver would not harm consumers and would not impede the development or operation of a competitive market. 220 ILCS 5/13-513. In addition, Staff's proposed rule allows flexibility and individual treatment for each of the Level 1 carriers. In the proceedings analyzing Verizon's remedy plan, Verizon will have the opportunity to provide evidence about its individual systems and particular challenges; standards regarding performance will be developed accordingly. In fact, the current remedy plans of Verizon and Ameritech are different and are tailored to their markets. Since each carrier will start with their tailored plan, Verizon's concerns that it will be painted with the same brush as Ameritech are unfounded.

Second, a waiver of this rule upon a showing of "adequate" service quality levels is inconsistent with the goals and objectives of the rule. This rule is intended to provide both accountability and incentive to carriers to achieve good service quality and to maintain it over time. Consistently good service quality is necessary to ensure the viability of competition relying on these services. If this rule operates as it is intended, all carriers subject to the rule will be providing good service. If as a result, they were all waived from the rule, there would not be any accountability in the future and service quality would more than likely slip. If carriers continue to provide inadequate service despite the rule, that will indicate that the incentives provided in the rule are not sufficient to change behavior and the rule or the individual remedy plans will need to be amended. To grant a waiver to a carrier providing "adequate" service would defeat the purposes of the rule. The waiver would impair accountability by allowing that carrier to operate in the dark. Impaired accountability would likewise tend to diminish the incentive for the carrier to provide good service quality.

Third, Verizon's proposed waiver provision is so inadequately drafted that it would be subject to abuse and would become an administrative burden on the Commission to try to correct the abuses. Verizon's waiver would permit a waiver of unlimited duration upon a one-time showing that the Level 1 carrier is providing "adequate" service. Id. at 12. "Adequate" service appears to be a lesser standard than "good" service or even service in compliance with Part 731. Considering Verizon's witnesses own statements that Verizon could not satisfy the proposed service quality standards, this ambiguity appears to be intentional.

In addition, if a carrier is exempted from the rule under this waiver provision, the waiver language provides no means to reinstate the rule's applicability upon a carrier once a waiver has been granted. Staff notes that it will be difficult to apply the provisions of the rule to the carrier if circumstances change since the carrier would not be subject to the standards or reporting requirements of Part 731 once the waiver has been granted. This waiver would also require the Commission to rely upon the complaint process, and in turn the financial and legal wherewithal of individual CLECs, to monitor and litigate service quality, and as stated above, the complaint process does not adequately address the Commission's concerns regarding service quality. For these reasons, Verizon's waiver proposal should be rejected.

Ameritech makes many of the same statutory construction arguments with respect to special access that it makes with respect to the rule as a whole. Ameritech IB at 15-16. Because these arguments have been addressed elsewhere in this brief, Staff will not repeat them here in connection with special access. Nevertheless, Staff is compelled to address one issue raised by Ameritech most aggressively in the context of special access. Ameritech argues that it is improper to impose standards on Ameritech and Verizon, as Level 1 carriers, that are different from those imposed on other carriers that may have fewer access lines or have other differentiating characteristics. Id. at 15. Ameritech claims that this "…conclusion applies with even more force to special access services." Id. In its Initial Brief, Staff supported the Rule's division of carriers into levels on the basis that differentiation is appropriate where there are vast differences in the characteristics of local exchange carriers operating in the state of Illinois. Staff IB at 7-9, 31-36. With respect to wholesale special access, differentiation is even more appropriate. Ameritech ignores the evidence of its own witness that Ameritech is the largest provider of wholesale services in Illinois (Tr. 735-736). Ameritech also ignores the evidence of (i) the Wireless Coalition that 95-100% of special access services provisioned to the Wireless Coalition members are provisioned by the Level 1 carriers (Wireless Coalition IB at 21) and (ii) WorldCom that competing carrier-customers of large incumbent Local Exchange Carriers like SBC-Ameritech and Verizon remain overwhelmingly dependent on SBC-Ameritech's and Verizon's wholesale intrastate "last-mile'' Special Access services (WorldCom Ex. 1.0 at 3). Clearly, if there was ever a category of services that justified differentiation among the carriers, it is wholesale special access.

Ameritech also makes some of the same jurisdictional arguments made by Verizon. Id. As a result, Staff will not repeat its response to those arguments. Staff notes, however, that Staff's response to Verizon is equally applicable to Ameritech.

Ameritech begins its brief on special access issues with an inaccurate or at least misleading statement. Ameritech states: "Parts of the Proposed Rule do not relate to basic local exchange service, but to 'special access' services that are provided to long-distance and wireless carriers." Ameritech IB at 13. Later in its brief, Ameritech similarly states, "[s]pecial access services, meanwhile, are provided to carriers *primarily* for long-distance and wireless services, neither of which qualifies as basic local exchange service. Id. at 16 (emphasis added). The implication is that special access services cannot be wholesale services that are used in the provision of basic local exchange service. The record indicates, however, that special access can be, and is, used in the provisioning of basic local exchange service. Thus, even under the restrictive (and in Staff's view, incorrect) interpretation of Section 13-712(g) by both Ameritech and Verizon, special access services would in some cases satisfy Ameritech's own requirement that wholesale services for purposes of Part 731 be defined as "…wholesale services that are used in the provision of basic local exchange service." Ameritech IB at 12. Therefore, even Ameritech and Verizon cannot legitimately argue that special access services should be eliminated entirely from the rule.

Ameritech also asserts, without legal support, that the market has already established standards and remedies for special access services and it would be improper to change these contract-based arrangements. Id. at 16. This is obviously incorrect. If it were truly improper to change by rule contract-based arrangements, the Commission would lose its jurisdiction over service quality to the extent private contracts addressed service quality standards. As Staff pointed out in its Initial Brief, the FCC has acknowledged that state commissions retain jurisdiction over intrastate special access. Staff IB at 78. Moreover, the Telecommunications Act of 1996 expressly preserves the state authority to regulate intrastate access services for purposes of furthering competition.

> Additional State Requirements. Nothing in this part precludes a state from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part.

47 U.S.C. § 261(c).

Additionally, in the context of approving negotiated interconnection agreements, state commissions have been specifically given the authority to establish or enforce service quality standards or requirements:

> Notwithstanding paragraph (2), but subject to section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

47 U.S.C. § 252(e)(3).

As a result, Ameritech's arguments regarding special access should be rejected. This Commission has the duty under Section 13-712(g) to establish wholesale service quality rules. Wholesale special access is relied upon by competitive carriers to provision telecommunication service. Ameritech has provided no compelling evidence why wholesale special access should be excluded from a carrier to carrier wholesale service quality rule.

WorldCom proposes certain changes to the definition of "Wholesale Special Access" that correspond to changes it proposed in its direct testimony. WorldCom IB at 9; WorldCom Exhibit 1.0 at 18. Staff does not believe that WorldCom sufficiently addresses the concerns Staff raised with respect to this proposed definition in Staff's Rebuttal testimony. See, Staff Exhibit 8.0 at 8; Staff IB at 80-82. As a result, Staff stands on the arguments made in its Initial Brief.

The Wireless Coalition raises several points in its Initial Brief that Staff believes have merit. First, the Coalition points out that if the Commission declines to order special access standards and remedies in this proceeding, these standards and remedies will be required to be adopted in the three-month period provided in Staff's proposed rule for analysis of the remedy plans of each of the Level 1 carriers. Wireless

Coalition IB at 24-25 (citing ICC Staff Ex. 7.1 at §731.210). The Wireless Coalition argues that it will be difficult to resolve special access issues in this three-month period since special access standards and remedies are currently not addressed in either of the Level 1 carrier's remedy plans. Staff agrees. This proceeding has demonstrated that the Level 1 carriers are resistant to developing special access standards despite the overwhelming evidence that they are needed and that special access itself is essential to many carriers' competitive strategies. Moreover, special access is complicated in that it differs depending in large part on the needs of the carriers ordering special access and may, for that reason alone, require additional time to litigate.

Second, the Wireless Coalition argues that Staff's rule requires carriers that utilize wholesale special access services to intervene and participate in the remedy plan proceedings of both Verizon and Ameritech in order to object to the proposed plans. Wireless Coalitions at 26. Staff again agrees. With respect to the standards and remedies relating to services other than special access service, this poses no particular hardship because these issues have been extensively litigated recently and any proposed changes should be minor (although this is perhaps optimistic).

The question for the Commission then is if, and to what extent, these concerns should be addressed. Staff suggests that, at the very least, the Commission should order the Level 1 carriers to take the initiative and propose special access standards and remedies. Staff suggests further that the Commission's order provide that the Level 1 carriers shall have the burden of establishing that these proposed standards are reasonable in light of historical performance, systems capability, creation of incentives for continued improvement in service quality performance and technological enhancement, and responsiveness to competitor's needs. This is reasonable in light of the fact that Level 1 carriers have virtually exclusive accessibility to information regarding their historical performance and systems/network capability in connection with special access. Furthermore, as owners of the network providing service to wholesale customers, the Level 1 carriers would typically be required to address the concerns of their customers. As these carriers seek the Commission's recognition that they are moving towards a competitive market, it will become increasingly important that they demonstrate their ability to treat their competitive customers, as they would retail customers.

Furthermore, this would prevent the very real possibility that the Level 1 carriers would wait until the briefing stage (as they did in this proceeding) before even discussing the merits of any other proposals, much less proposing their own standards and remedies. In addition, Staff recommends that these proposals be made within thirty days after the Joint Committee on Administration of Rules completes its review of this rule and, further, that the parties be directed to hold workshops or collaboratives with the goal of reducing the issues relating to special access prior to litigation of the remedy plans.

VIII. Subpart F – ARGUMENTS REGARDING PROVISIONS APPLICABLE TO LEVEL 2 CARRIERS

Subpart F sets forth the obligations of Level 2 carriers. Staff IB at 14. In short, the services covered for Level 2 carriers in this rule are unbundled local loops, interconnection trunks, resold local services, collocation, loop notification, and customer service record. *Id*. There are currently three carriers that would meet the requirements for Level 2 carriers. They are Illinois Consolidated Telephone Company ("ICTC"), Gallatin River Communications L.L.C., and Citizens Telephone Company. ICTC has not objected to Staff's proposed rule. Gallatin River has fully endorsed Staff's proposed Part 731. Gallatin River IB at 1. In support of Staff's proposed Part 731, Gallatin River "agrees with Mr. McClerren that Staff's final draft rule 'is in the public interest and responsive to the legislature's direction for the Commission to promulgate service quality rules ….'" *Id*. Moreover, the Illinois Rural Competitive Alliance ("IRCA"), a coalition of nine CLECs that either compete or intend to compete in rural markets served by Level 2 carriers, urge the Commission to adopt Staff's proposed Part 731 "*in toto*" because they find that Staff's proposed rules will promote competition in rural markets. IRCA IB at 2-3. IRCA explained that Staff's proposed subpart F will "provide a measure of assurance that CLECs competing in rural territories will receive minimum levels of service from the ILECs against whom they compete." IRCA IB at 3.

In contrast to ICTC, Gallatin River and IRCA, Citizens objects to virtually every substantive facet of Staff's proposed rules regulating Level 2 carriers' provision of wholesale services. In light of the fact that only Citizens objects to Staff's proposed minimum rules and in light of the nature of Citizens' objections and proposed alternatives, it is clear to Staff that Citizens essentially objects to any Commission regulation of its provision of wholesale services.

A. Citizens' Complaints

Citizens, in general, argues that the Commission should disregard Staff's proposed Part 731 rules for Level 2 carriers found primarily in Subpart F and, instead, adopt Citizens proposed alternatives. In support of its overall position, Citizens contends that: (1) Staff's proposed Part 731 is "too broad and extensive" in scope and should be reduced to cover only Unbundled Loops, Interconnection Trunks and Resold Local Lines; (2) there should be "minimal thresholds of wholesale service activity" before the measures, remedies and reporting requirements are applicable to Level 2 carriers: (3) there should be a "percentage within" standard of 90% for provisioning and a 95% standard for repairs; (4) the remedies for a single order should be "capped at 10 times the monthly recurring charge;" and (5) Level 2 carriers should be allowed to file their own Wholesale Service Quality Plan for Commission approval, which would relieve such Level 2 carriers from the obligations of Subpart F of Staff's proposed Part 731.

Before addressing Citizens' specific arguments, Staff has a few general comments regarding Citizens' positions. First, although Citizens makes numerous arguments regarding why the Commission should disregard Staff's proposed Part 731 rules for Level 2 carriers and, instead, adopt Citizens proposals, there are a few themes found throughout their arguments. For instance, ICTC repeatedly asserts that no CLEC has experienced any problems being provisioned wholesale services from a Level 2 carrier while simultaneously arguing that the volume of such provisioning has been "minimal" and, moreover, that Staff's proposed rules are "unachievable." See Citizens IB at 3. In fact, such inconsistencies in logic pervade Citizens' Initial Brief.

More specifically, Citizens claims that Staff's proposed wholesale service quality standards for Level 2 carriers are not based upon: (1) the quantity of wholesale services provided by Level 2 carriers; (2) Level 2 carriers' wholesale performance deficiencies; or (3) the ability of Level 2 carriers to meet the proposed standards. Citizens IB at 4-9.

1. Staff Addressed Citizens' Low Volume And No Complained Of Deficiencies Concerns By Crafting A Rule With Multi Levels

Regarding the quantity of wholesale services provided by Level 2 carriers, Citizens notes that there are only three ILECs that would meet Staff's definition of a Level 2 carrier. Citizens IB at 4-5. Combined these three potential Level 2 carriers serve roughly 300,000 access lines, with each carrier serving roughly one third (or 100,000) of those access lines, according to Citizens. *Id*. at 5. Citizens concludes that the volume of wholesale services provisioned by potential Level 2 carriers is "minimal." *Id*. Citizens, apparently, contends that due to the alleged low volume of wholesale services provisioned by potential Level 2 carriers that there is no need for even Staff's proposed *minimum* requirements for Level 2 carriers. Staff disagrees.

First, the fact that Citizens may provision "minimal" volumes of wholesale service supports Staff's recommendation that they be considered a Level 2 carrier (as opposed to a Level 1 carrier). As explained fully in Staff's Initial Brief (6-9), one aspect of the current competitive telecommunications market in Illinois that is pertinent to this rulemaking is the fact that competitive carriers, purchasing wholesale service, purchase most of their wholesale services and products from the larger ILECs. ICC Staff Ex. 1.0 at 6. Staff, accordingly, designed a multi-level rule to address the appropriate performance standards, reporting requirements, and remedies between large ILECs on the one hand and smaller ILECs and CLECs on the other. *Id*. Staff adopted a multi level classification of carriers with specific requirements unique to each level to address this need. With respect to Level 2 carriers, moreover, Staff proposed a limited set of performance measures to eliminate the administrative burdens of developing and maintaining a wholesale service quality plan similar to the pre-existing plans of the Level 1 carriers. Staff IB at 6-8.

With respect to Citizens' argument that the low volume of wholesale services they provide justifies exemption from Staff's rule, is inconsistent with the evidence provided by Citizens' own witness. Citizens' witness, Mr. Mason, testified at the evidentiary hearing that in "at least three of the territories served by Citizens in Illinois, that there is substantial [market] penetration" by CLECs, which market penetration amounts to "greater than 50 percent" in those three territories. Tr. 134-35; *see also* IRCA IB at 8. Staff's proposed wholesale service quality rules for Level 2 carriers are, therefore, needed not only in the future as competition increases throughout the state of Illinois, but also now in at least three territories served by Citizens.

Citizens, furthermore, characterizes Staff's proposed rule for Level 2 carriers as "a textbook case of a solution in search of a problem," implying that Staff's rule is unreasonable because there is no problem. Citizens' IB at 7. Even if Citizens' assertion that there are no wholesale service quality problems with Level 2 carriers is accurate, which point Staff does not concede, Staff's rule is still reasonable because the adoption of minimum standards ensures service quality for wholesale services.

2. Citizens' Statements That It Cannot Meet The Proposed Standards Are Not Credible

First, Citizens' pessimistic position that it cannot meet Staff's proposed requirements is simply not credible. Citizens' IB at 8-9. As noted above, Staff crafted a multi-level rule to accommodate the distinctions between large ILECs, smaller ILECs, and CLECs. As Staff witness Dr. Patrick has noted, moreover, while many of the Level 1 performance benchmark standards can be measured in seconds, minutes, or hours, the Staff proposed Level 2 performance standards are measured in hours or days, with the shortest duration Staff proposes is eight hours, while the longest duration is 90 business days. Staff Ex. 10.0 at 17-18. It is, thus, reasonable and legitimate for the Commission to promulgate bare *minimum* standards for Level 2 carriers to meet in the provisioning of wholesale services, regardless of their track record of providing such services.

Citizens' pessimistic statements, moreover, are clearly undermined by the fact that neither ICTC nor Gallatin River, both of whom would have to also meet Staff's proposed minimum standards for Level 2 carriers, believe that Staff's proposed standards are so onerous as to even make a single objection to any portion of them. Citizens' self-serving pessimism is also inconsistent with its equally self-serving eternally optimistic position that because not one CLEC has complained about Citizens' provision of wholesale services that there is no need for Staff's proposed minimum standards. Citizens' IB at 6-7. If Citizens' provision of wholesale services have been unproblematic to date and if "it is important to recognize that CTC-Illinois will endeavor to provide [wholesale] service as quickly as it can" (Citizens Ex. 2.0 at 28), then Staff fails to understand why Citizens claims it will be unable to meet the minimum standards that Staff has proposed. Staff Ex. 10.0 at 5. By Citizens own measure, moreover, it has provided such a low volume of wholesale services as to generate a track record that would be void of any meaningful evaluation of whether they could or could not meet Staff's proposed *minimum* standards.

Citizens appears to imply that the Commission, even when expressly ordered to do so, cannot promulgate rules to address service quality problems that are likely to appear but have not fully presented themselves. Staff knows of no such limitation on either its authority or on the General Assembly's authority to promulgate prospectively and Citizens provides no citation for such a novel and radical view.

3. Citizens’ Proposal To Limit The Scope Of Wholesale Services Should Be Summarily Rejected

Citizens argues that the scope of wholesale services addressed for Level 2 carriers should be reduced by deleting Collocation, Loss Notification and Customer Service Records standards. Staff disagrees.

a) Collocation

Like Citizens’ arguments addressed above, it contends that because no CLEC has complained about obtaining Collocation or repairs associated with Collocation from a Level 2 carrier then it follows that there is no need for wholesale service quality rules to address Collocation for Level 2 carriers. Citizens IB at 12-13. Citizens, again, appears to contend that the Commission is precluded from taking any action in fulfilling their obligations under the PUA until *after* a problem has occurred, even though the Commission can reasonably foresee problems before they occur. Citizens fails, however, to cite to any authority for such a radical limitation on the Commission’s authority. The reason Citizens fails to cite to any authority for its novel proposition is obvious -- there is no such authority.

Staff’s proposed rules, moreover, provide Level 2 carriers, including Citizens, with the opportunity to negotiate their own performance measure plans with other CLECs, and incorporate these plans into their interconnection agreements with those CLECs as long as they are not contrary to the public interest. *See* section 731.630. Staff’s proposed rules, as IRCA stated, are a “necessary set of default regulations for those CLECs that lack bargaining leverage to secure minimum performance measures that will promote competition, and protect their ability to serve customers." IRCA IB at 10. Other than Citizens' unsupported and self serving statements that they will not be able to meet Staff's proposed standards, there is no record evidence that Level 2 carriers will not be able to meet Staff's proposed *minimum* standards. In fact, Citizens incredible statements are undermined by their own assertions that no CLEC has ever complained about its provision of wholesale services. Citizens is also further undermined by the undisputed fact that Gallatin River wholeheartedly endorses Staff's proposals and ICTC has not objected to any of Staff's proposed rules.

Citizens' complaint regarding "potential" inconsistencies between Staff's proposed rules on Collocation and the FCC's collocation rules are equally nonavailing. 47 CFR 51.323(1)(i). Citizens, fails to cite to any authority regarding such a position. The Telecommunications Act of 1996 ("TA 96"), moreover, tends to undermine Citizens' position. TA 96 expresses a preference for States to continue to establish and implement local service quality standards. *See* § 252(e)(3) ("[N]othing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law . . ., including requiring compliance with intrastate telecommunications service quality standards or requirements.") and § 253(b) ("Nothing in this section shall affect the ability of a State to . . ., ensure the continued quality of telecommunications services, and safeguard the rights of consumers."). Staff does not agree with Citizens' characterization of Staff's rule as inconsistent with the FCC's collocation rules. The Commission has the right to impose additional obligations upon ILECs, particularly in the context of service quality. Additional obligations are not per se inconsistent.

Citizens, moreover, uses the example of virtual collocation repairs as a potential inconsistency, even though under Staff's proposed rule Citizens would potentially have more time to complete repairs than under the FCC standards. Citizens IB at 15. IRCA, however, who represents CLECs that would be adversely affected by Staff's potential inconsistency with the FCC standards has not objected; in fact, IRCA wholeheartedly endorses Staff's proposed rules and recommends that they be adopted "*in toto*." IRCA IB at 3.

b) Loss Notifications and CSRs

Citizens contends that Staff's proposed Level 2 carrier rules for Loss Notifications and CSRs should be deleted from Part 731 because it finds the triggering "event" to be ambiguous in that the processes will be subject to different interpretations by CLECs, resulting in possible disputes. Citizens IB at 15. Citizens, in large part, bases their argument on some cross questions of Staff witness Ms. Jackson. Although Citizens acknowledges Ms. Jackson explained that Level 2 carriers could implement their own process for triggering the Loss Notification, Citizens ignores the rest of Ms. Jackson's explanation. Tr. 345-46; Citizens IB at 15-16. Ms. Jackson explained that Level 2 carriers "can implement their own process *as long as they educate their carriers that they work with and communicate the method of how they plan to send or provision the line loss notice*." Tr. 345. In response to a cross question from Citizens' counsel, Ms. Jackson reemphasized the point that Citizens can establish its own processes regarding the triggering event "as long as it communicates the processes with its carriers." Ms. Jackson continued to explain that the triggering event would be communicated to CLECs via a provision in an "interconnection agreement or something in a tariff, as long as there is some documentation that spells out how they plan to do it." Tr. 346-47.

In effect, Citizens is complaining that the processes they will develop, their own processes, for triggering Loss Notifications will be ambiguous, which is clearly an unreasonable complaint because Citizens can obviously clear up any ambiguity it would have created. In light of Ms. Jackson's testimony, moreover, Citizens' "ambiguity" issue is really a non-issue as Staff has made it abundantly clear that any such process will have to be communicated to and explained to CLECs and documented in either a tariff or an interconnection agreement eliminating upfront any potentially different interpretations by CLECs.

Citizens also complains that Staff's proposed definition of CSRs is potentially ambiguous. Citizens IB at 16. Because of the alleged "potential ambiguity," Citizens recommends that standards for both CSRs and Loss Notifications "would be more appropriately be established on a case-by-case basis . . .." *Id*. at 17. Staff disagrees.

First, although Ms. Jackson testified as characterized by Citizens (*Id*. at 16-17), the point she also clearly made was that Staff did not contemplate billing and credit information or vertical services in the definition of CSRs because it had no intention of including them. As Ms. Jackson testified:

> Staff had envisioned what might be added as the services and the features that the customer currently has so that if a carrier is to sign them up for service, they can make a comparison, not automatically assign those services and features but say something like, I see that you've had in the past - you've had maybe caller ID, three-way calling, are those still plans that you want to [continue] with.

Tr. 322-23. Non-regulated services such as dial-up internet services likewise were never intended by Staff to be included in the definition of CSRs. Tr. 323.

Ms. Jackson also testified that even though Citizens may not have received many complaints from CLECs regarding untimely provision of CSRs and Loss

Notifications, the complaints that Staff receives also come from end-user consumers. Staff Ex. 11.0 at 4. Disgruntled consumers complain about the amount of time it takes to transfer service are likely to call the new service provider, the CLEC, rather than the old service provider, the ILEC. *Id*. Staff, moreover, provided record evidence, obtained through data requests to various CLECs, that due to untimely Loss Notifications, consumers have been double billed or continue to receive bills from their former carrier after having switched carriers. Staff Ex. 11.0 at 5-6; Staff Ex. 12 and Staff Ex. 13 PR.

Staff, moreover, throughout the promulgation of Part 731 has attempted to be flexible and not promulgate knee-jerk reactive rules for every conceivable potentiality. In fact, as Staff pointed out in its Initial Brief (42-43), the Commission may proceed one step at a time in imposing regulations in a specific area, and may choose to direct its initial efforts where it discerns the greatest need. *See e.g.*, *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 99 L. Ed. 563, 75 S. Ct. 461 (1955); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98 and 99-68, Order on Remand and Report and Order, FCC 01-131, ¶ 94 (rel. Apr. 27, 2001) (The FCC rejected "the notion that it is inappropriate to remedy some troubling aspects of intercarrier compensation until we are ready to solve all such problems. In the most recent of our access charge reform orders, we recognized that it is 'preferable and more reasonable to take several steps in the right direction, even if incomplete, than to remain frozen' pending 'a perfect, ultimate solution.'").

Finally, Citizens' recommendation that the Commission establish standards for CSRs and Loss Notifications on a case-by-case basis is utterly impractical. Under

Citizens' case-by-case proposal, establishing performance measures and the accompanying remedy plans for each individual Level 2 carriers could take years, and would occur at a critical time when competition is just emerging in Level 2 carrier's service territories. IRCA IB at 7-8. As Staff witness Sam McClerren testified, establishing separate measures and remedies for each Level 2 carriers "would be very painful" and entail "a lot of work" and include "[m]any motions, a lot of discovery problems." Tr. 534. Finally, the biennial review of rules will enable the Commission to determine whether any modifications need to Part 731 based upon real experience and not mere self-serving speculation.

4. The Commission Should Not Establish Minimum Quality Thresholds for Wholesale Services

Citizens argues that the Commission should include a wholesale service quality threshold before the compliance and reporting requirements in Part 731 apply. Citizens IB at 20. In support of its position, Citizens contends that because of the low volume of wholesale service requests in its territories it "should not be expected to meet rigorous performance standards unless some threshold of wholesale activity occurs." Id. at 21. Staff disagrees.

As Staff noted in its Initial Brief (49-50), Staff's proposed rule does not subject a Level 2 carrier to "rigorous performance standards." To the extent a Level 2 carrier offers or provides the service, there are six measures for Level 2 carriers, with a total of 15 standards disaggregated from those measures. ICC Staff Ex. 7.0 at 20-21. Compare that number to existing wholesale performance measure plans containing approximately 150 measures and the corresponding thousands of standard disaggegations, and it becomes clear that 15 standards cannot reasonably be considered “extensive.” *Id*. The concept of threshold amounts of activity was discussed in the workshops, but parties were unable to agree that they were appropriate. Through reduction, associated remedy amounts were revised to address the need for threshold levels. *Id.*

IRCA, moreover, points out that under Citizens’ proposal “it would make it impossible for any one CLEC to know whether a Level 2 carrier failed to comply with the Commission rules with respect to their own service orders.” IRCA IB at 12; IRCA Ex. 2.0 at 11. Such an “unduly complicated” process would create “unnecessary confusion.” for very little benefit. *Id*. For these reasons, the Commission should summarily dismiss Citizens’ “threshold” proposal.

5. Staff’s Proposed Remedies For Level 2 Carriers Are Not Arbitrary And Do Not Violate § 712(g).

Citizens argues that Staff’s proposed rule is arbitrary and violates § 712(g) because it requires Level 2 carriers to meet performance standards 100% of the time or pay customer remedies or credits. Citizens IB at 22-29. Citizens, in support of its “arbitrary” position, notes that there is no record evidence that "would even remotely suggest that any potential Level 2 carrier in Illinois can achieve 100% compliance with the Staff's proposed wholesale service standards." *Id*. at 23. Staff disagrees with all of Citizens’ contentions.

a) Staff's Usage Of Hard Benchmarks Is Not Arbitrary

First, as fully explained in Staff’s Initial Brief (55-59), Staff, based upon data provided by Level 2 carriers, expects that Level 2 carriers will face drastically smaller volumes of wholesale orders than Level 1 carriers. Tr. 371. Staff also notes that Citizens itself claims that the level of wholesale services it provides is "minimal" and not likely to increase soon. Citizens IB at 5, 21. Staff, consequently, in establishing the Level 2 standards, the associated remedies, and the relationship between the providing Level 2 carrier and the requesting carrier, tried to keep it simple: that is, one miss, one remedy, and one carrier. Tr. 371. Staff explained that it uses benchmark standards for Level 2 carriers because it is extremely difficult to do parity calculations for small volumes of orders. Tr. 374. There needs to be large volumes on at least one side for parity calculations. *Id*. Because Level 2 carriers do not expect large volumes on either side, Staff did not recommend parity as a standard for Level 2 carriers. *Id.*

Staff also noted that the "Pre-existing Plans" for both Ameritech and Verizon contain benchmark standards as well as parity comparison standards. Staff Ex. 4.0 at 8. Performance standards expressed as benchmarks allows for dichotomous determination of passage and failure. *Id*. The performance standard would either be met, or not. Hard benchmarks also provide more consistency with other Commission rules regulating service quality. *See e.g.*, section 13-712(d)(2); 730.525.

The principal advantage of benchmark standards, however, is that they minimize the reliance on statistical testing for determining whether acceptable performance has been provided or achieved. Staff Ex. 4.0, at 8. Statistical testing methods, such as parity testing or expressing standards as "a percentage within" a standard, would be administratively burdensome on Level 2 carriers. As noted above, Staff's proposed Part 731 emphasizes very simple remedy calculations because all indications are that Level 2 carriers are expecting to be providing low volumes of interconnection services. Staff Ex. 10.0, at 17; Tr. 371; Staff IB at 57-58.

Introducing a “percentage within” definition to performance standards for Level 2 carriers, as Citizens recommends,[10] will not improve the carrier-to-carrier service quality rules, and will introduce an unnecessary level of complexity for all parties. Staff Ex. 10.0, at 19. Level 2 carriers would have additional difficulty measuring the performance given, calculating remedies, and reporting their results. *Id*. Requesting carriers will have less assurance that their service requests will be answered within an established time frame, and that they will receive a remedy credit that is easy to calculate. *Id*. Staff, moreover, would face additional complexity in their oversight and monitoring functions. Staff IB at 59.

Regarding Citizens' point that there is no record evidence that "would even remotely suggest that any potential Level 2 carrier in Illinois can achieve 100% compliance with the Staff's proposed wholesale service standards," Staff would just note that Gallatin River endorses Staff proposed rule in all of its facets. See Gallatin River Initial Brief. If Gallatin River thought that it could not substantially comply with Staff's proposed rule, as Citizens so clearly implies, it is highly unlikely that Gallatin River would endorse Staff's proposed rule. Likewise, ICTC has not objected to Staff's rule, also implying that ICTC believes that it can substantially comply with Staff's proposed rule. In sum, Staff's rationale for employing a hard benchmark for Level 2 carriers is well reasoned and can hardly be said to be arbitrary.

b) Staff's Proposed Rule Does Not Violate Section 712(g)

Citizens' argument that Staff’s proposed rule violates § 712(g) is absurd. As Staff noted in its Initial Brief (31-32), the language of Section 13-712(g) is very broad, and

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[10] AT&T joins Citizens in making the “percentage within” proposal. AT&T IB at 12-13.

contains no restrictions or limitations on the Commission's obligation and authority to establish carrier to carrier wholesale service quality rules as suggested by Citizens' position. Staff submits that the legislature's intent in issuing a broad mandate to the Commission to adopt wholesale service quality rules was to allow the Commission substantial discretion to use its expertise to enact rules tailored to develop and nurture the emerging competitive local telecommunications market. Illinois courts, moreover, have long held that an express statutory grant of authority to an administrative agency also includes the authority to do what is "reasonably necessary" to accomplish the legislature's objective. *Lake Co. Board of Revenue v. Property Tax Appeal Bd.*, 119 Ill. 2d 419, 427 (1998); *Abbott Labs v. Illinois Commerce Comm'n*, 289 Ill. App. 3d 705, 712 (1997). Further, reasonable discretion is afforded administrative agencies so they can "accomplish in detail what is legislatively authorized in general terms." *Lake Co. Bd. Of Revenue,* 119 Ill. 2d at 428.

There is no specific direction to the Commission other than for the Commission to establish and implement carrier to carrier wholesale service quality rules and establish "remedies" to ensure enforcement of those rules. The legislature used the plural of remedy, clearly authorizing the Commission to consider more than one type of remedy payment. The legislature, moreover, neither required the Commission nor limited its ability to consider particular remedies. In short, based on the broad and general language of Section 13-712(g), the legislature expected the Commission to use its expertise and judgment in developing reasonable wholesale service quality rules, including any "remedies" it found necessary to ensure enforcement. In light of the clear expressed authority by the General Assembly that the Commission "establish remedies to ensure enforcement of" wholesale service quality rules contained in § 13-712(g) and the implied authority to do what is reasonably necessary to accomplish the legislature's goals, the Commission has the authority to promulgate Level 2 carrier remedies as Staff has proposed.

6. The Commission Should Not Establish A Penalty Cap For Each Particular Service Order

Citizens contends that Level 2 carriers' potential exposure should be reduced by establishing a penalty cap. As Staff explained fully in its Initial Brief (63-64), a cap on remedies owed actually provides a disincentive for providing carriers to meet established standards, which would also encourage anti-competitive behavior. In general, if remedies, such as the ones in the proposed Section 731.610, are capped at a certain level, a providing carrier can easily calculate the amount of delay (or "miss") that will result in the maximum possible remedy. Staff Ex. 10.0, at 6. Once that amount is known, the carrier can engage in a simple calculation exercise, and determine if the cost of meeting the standard, or of meeting the standard plus some amount of "affordable" miss, is worth avoiding the maximum penalty amount. *Id.* Therefore, once Citizens makes these calculations, it will have been provided a disincentive to meet established standards and an incentive to engage in anti-competitive behavior. *See also* IRCA IB at 16 ("To put a cap on the remedies would allow those level 2 carriers who fail most in providing wholesale service to escape the full effect of the regulations; carriers that meet the service requirements have nothing to be concerned about under Staff's remedy scheme."). For these reasons, the Commission should summarily reject Citizens' penalty cap proposal.

7. The Commission Should Add Additional Exclusions To Section 731.605 As Recommended By Citizens

Citizens contends that Level 2 carriers should not be held to their performance standards in Section 731.605(a)-(c) "if the delay in provisioning or repair was the result of a negligent or willful act on the part of the end-user retail customer or the result of a malfunction of equipment owned or operated by the end-user retail customer." Citizens IB at 30. Staff agrees. As Staff witness Mr. McClerren indicated on cross examination, it would not be appropriate to penalize a Level 2 carrier if the CLEC would be exempted. Tr. 523-25.

In order to address this concern, Citizens proposes to add the phrase "or the end-user retail customer to the end of section 731.605(e) subsections (1) and (2). Citizens IB at 32. Staff agrees with Citizens' proposed minor modifications to Staff's proposed section 731.605.

8. The Commission Should Reject Citizens' Proposal To Allow Level 2 Carriers To Submit Their Own Company Specific Wholesale Service Plans For Approval

Citizens' proposal to allow Level 2 carriers to initiate a separate proceeding at the Commission to submit company specific wholesale service quality plans is simply unworkable. Under Citizens' proposal, such plans would be in lieu of the requirements set forth in Staff proposed subpart F. Citizens IB at 36. A Level 2 carrier that chose not to develop its own specific plan would fall under the requirements of Staff's proposed subpart F. *Id*.

As Staff witness Mr. McClerren testified, the individual plans for Level 1 carriers are justified for several reasons including the different systems of Level 1 carriers and their importance to the emerging competitive local telecommunications market in Illinois.

Development of individual wholesale service quality plans will require the investment of time and money by both the Provisioning Carrier submitting the plan as well as Requesting Carriers that desire to comment on the plan. An additional component of the justification for individual plans for Level 1 carriers is that the amount of competitive activity justifies the expense from the perspective of both the Provisioning Carrier and Requesting Carriers. Allowing all Level 2 carriers the option of being treated as a Level 1 carrier would force Requesting Carriers to comment on their plans and participate in those proceedings. In Staff's view, this would place an unreasonable burden and expense on Requesting Carriers (particularly smaller CLECs) purchasing service from a Level 2 carrier. The measures and standards applicable to Level 2 carriers are reasonable minimal measures and standards. Citizen's proposal would impose an unreasonable administrative burden on Requesting Carriers and the Commission and should be rejected. Staff Ex. 7.0 at 19.

Citizens, in support of its position, emphasizes that Staff has not documented "how much time or how burdensome it would be" to allow Level 2 carriers to initiate separate Commission proceedings to review company specific plans. Citizens IB at 37. Common sense dictates that an attempt at quantifying the Commission's and interested CLECs' costs and time as Citizens proposes would be an absurdly futile exercise and an utter waste of the Commission's scarce resources in itself. Mr. McClerren, however, did testify, based upon his experience in promulgating the Ameritech remedy plan in Docket 01-0120, that establishing separate measures and remedies for each Level 2 carriers "would be very painful" and entail "a lot of work" and include "[m]any motions, a lot of discovery problems." Tr. 534; see also IRCA IB at 7-8. Staff also notes that, as with all of Citizens' other numerous proposes, no other Level 2 carrier supports their positions. Finally, Staff would again point out that the biennial review of rules enable the Commission to determine whether any modifications need to be made to Part 731 based upon real experience and not self-interested conjecture.

IX. STAFF'S PROPOSED PERFORMANCE STANDARDS AND REMEDIES IN SUBPART H

A. CLEC Objections

Allegiance, MTSI[11], Nuvox, RCN and TDS Metrocom (for ease of reference, collectively referred to as "Allegiance"), and AT&T and WorldCom all object to Staff's proposed performance standards for CSRs, Loss Notification and Unbundled Loop Returns and their accompanying remedies found in Staff's proposed subpart H, section 731.800, 731.805, and 731.810. The CLECs have articulated differing rationales for their similar positions.

In support of its position, AT&T points out that Level 4 carriers are CLECs and not ILECs and, thus, have no legal obligations to offer wholesale services. AT&T IB at 12. AT&T would, however, support a rule that contained a triggering event, such as the performance standards and remedies would not be applicable to Level 4 carriers unless the CLEC becomes subject to § 251(c) unbundling obligations. *Id*.

WorldCom, on the other hand, finds Staff's proposed performance standards and remedies in subpart H to be premature because there are ongoing 13-state CLEC-to-CLEC migrations collaboratives taking place for the SBC region, including the Ameritech states. WorldCom IB at 17-18. WorldCom, consequently, believes it would be

[11] McLeodUSA Telecommunications Services, Inc.

“premature to codify any such standards and set benchmarks before the processes are established for different migration that may occur between LECs, ... *Id*. at 18.

Allegiance, on the other hand, contends that such requirements should not be in subpart H for a number of reasons. First, it notes that Level 1 carriers control over 80% of all access lines and, thus, provide a high volume of wholesale services while Level 4 carriers will be required to provide Unbundled Loop Returns and CSRs relatively infrequently and on an ad hoc basis that would not cost-justify establishment of a sophisticated processes. Allegiance argues that both of these facts would justify such requirements for Level 1 carriers but not for Level 4 carriers. Allegiance IB at 15-16. Second, Allegiance notes that CLECs do not charge Ameritech for Unbundled Loop Returns or CSRs. Thus, Staff’s proposed rule would a CLEC to provide a credit to an ILEC or a successor CLEC for a service that the original CLEC had not charged for in the first place. Allegiance IB at 16. Allegiance also notes that such costs will eventually be passé don to end user customers. *Id*.

Regarding Loss Notifications, Allegiance acknowledges that timely provision of Loss Notifications from Ameritech have been a problem, but that there is no record of similar problems regarding untimely provision of Loss Notifications from CLECs. Allegiance IB at 18. Staff disagrees with all of the CLECs positions and supporting rationales.

B. Staff’s Response To CLEC Objections

First, Staff fully explained in its Initial Brief the critical importance, from a consumers point of view, of timely and accurate CSRs (70-72), Unbundle Loop Returns (72-73), and Loss Notifications (74-75). Those explanations will not be rehashed here. The Commission should understand, however, that from a consumers point of view, there is little, if any, distinction between ILECs and CLECs. Importantly, Staff's proposed requirements will also aid in ensuring that Level 4 carriers meet their statutory obligations under § 13-902(c)(3) of the PUA. Staff Ex. 5.0 at 6.

1. AT&T

Regarding AT&T position that Level 4 carriers are CLECs and not ILECs and, thus, have no legal obligations to offer wholesale services, Staff would again point out that it considered the difference between ILECs and CLECs in designing its proposed rule, including multi-levels to address the distinctions upon which AT&T bases its argument. The Commission, accordingly, should dismiss AT&T's recommendation.

2. WorldCom

Regarding WorldCom's argument Staff's proposed performance standards and remedies in subpart H are premature because there are ongoing 13-state CLEC-to-CLEC migrations collaboratives taking place for the entire SBC region, Staff notes that it has neither control over nor influence in when that collaborative will end or in what type of determinations the collaborative will make. As noted repeatedly above, §13-712(g) requires the Commission to promulgate "carrier to carrier wholesale service quality rules.". WorldCom does not provide a persuasive argument as to why the Commission's rulemaking should be delayed pending completion of this collaborative. Section 13-712(g), moreover, certainly does not authorize the Commission to delegate its statutory authority to some other collaborative entity. The Commission, accordingly, should dismiss WorldCom's recommendation.

3. Allegiance

Regarding Allegiance's issue of CLEC low volumes and the attendant ad hoc processes, Staff witness Ms. Jackson testified that the standards proposed by Staff did not contemplate sophisticated CLEC OSS systems but, rather, contemplated less sophisticated systems such as facsimile processes for transmitting Loss Notifications and CSRs, which is why the standards for Level 4 carriers are not burdensome; only 24 hours while the remedy is minimal, only $1 per failure, which, of course, would be applied only to the failures amongst the low volumes that Allegiance alleges. Staff Ex. 11.0 at 2-3; Tr. 324. Furthermore, as Allegiance appears to acknowledge, Level 1 carriers are required under their pre-existing plans to pay a remedy for untimely delivery of CSRs to CLECS. Staff Ex. 5.0 at 4.

Allegiance argues with respect to Loss Notifications that because no record of problems regarding untimely provision of Loss Notifications from CLECs exist, there is no need for the Loss Notification standard and remedy. Staff would direct Allegiance's attention to Ms. Jackson's response to questions from the ALJ, where Ms. Jackson states that Consumer Services Division's records for the time period from January to May of 2002, indicate that "30% of Line Loss complaints were for double billing or continuous billing after the customer had switched to another carrier." Tr. 334-35; *see also* Staff Ex. 12 and Staff Ex. 13 PR. Staff also notes that its rule will ensure that critical Loss Notifications will be performed in a timely and accurate manner. The Commission, accordingly, should dismiss Allegiances recommendation.

X. ALLEGIANCE'S OBJECTION TO STAFF'S PROPOSED RULE BEING APPLICABLE TO LEVEL 4 CARRIERS THAT ARE NOT OBLIGATED BY LAW TO PROVIDE WHOLESALE SERVICES

Allegiance's argument here is similar to the one posited by AT&T in the section immediately above. Staff would again point out that it considered the difference between ILECs and CLECs in designing its proposed rule, including multi-levels to address the distinctions upon which Allegiance bases its argument. Staff, accordingly, urges the Commission to adopt the language found in Staff's proposed section 731.815(a) in its entirety.

XI. CONCLUSION

WHEREFORE, for all the reasons set forth herein, the Staff of the Illinois Commerce Commission respectfully requests that its recommendations be adopted in this proceeding.

Respectfully submitted,

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